KEWANGAN BERSATU BHD

v.

SIDAX LATEX INDUSTRIES SDN BHD

COURT OF APPEAL, PUTRAJAYA
DENIS ONG JCA
TENGKU BAHARUDIN SHAH JCA
ZULKEFLI MAKINUDIN JCA
[CIVIL APPEAL NO: W-02-304-2001]
26 OCTOBER 2005

CIVIL PROCEDURE: *Appeal - Summary judgment, decision to refuse - Whether there were triable issues - Whether appeal should be allowed*

This was the appellant's appeal against the decision of the High Court judge dismissing its application for summary judgment under O. 14 r. 1 of the Rules of the High Court 1980 against the second, third, fourth and fifth respondents, the joint and several guarantors to the hire purchase agreements ('the HP agreements'). Judgment in default of appearance had already been entered against the first respondent. The facts were that the first respondent had entered into the HP agreements to hire various machines with the appellant, a licensed finance company. Due to the first respondent's breach of the HP agreements, the appellant had suffered damage and losses. Despite the notices of demand sent to all the respondents, they still failed to pay their debt. Subsequently, the appellant took action against them in the High Court. The judge had found that there were triable issues which meritted a full trial such as: (1) the account numbers of the HP agreements as stated in the statement of balance in exh. RK3 were different; (2) no evidence that the sum of RM10,000 being the sales proceeds of the machines under the HP agreements were taken into account; and (3) no notice of termination pursuant to cl. 10 of the HP agreements were issued.

Held (allowing the appeal)
Per Zulkefli Makinudin JCA:

[1] In the statement of balance in exh. RK3 for the respective HP agreements, the account number had been wrongly stated as '95'. However, the error in the account number in exh.

RK3 was corrected by a further affidavit by the appellant. A mere typographical error did not amount to a triable issue. (pp 214 H - I & 215 F)

[2] The appellant had taken into account the sum of RM10,000 and this was stated in para. 7 of the further affidavit. The second to the fifth respondents could not arbitrarily dispute the accounts of the appellant as the conclusive evidence clause stated in cl. 2 of the respective letter of guarantee would apply. The alleged issue that the said RM10,000 was not taken into account was not a triable issue. (pp 215 G & 216 A - H)

[3] The respondents conceded that there was a notice of termination issued pursuant to cl. 10 of the HP agreements. The second, third, fourth and fifth respondents had consented to the sale of the repossessed machines for RM10,000 and had subsequently proposed settlement of the balance outstanding sum. By such conduct the respondents were estopped from raising the issue that no notice of termination pursuant to cl. 10 of the respective HP agreements were issued. (p 214 E - G)

Bahasa Malaysia *translation of headnotes*

Ini adalah rayuan perayu terhadap keputusan hakim Mahkamah Tinggi yang menolak permohonannya di bawah A. 14 k. 1 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk penghakiman terus terhadap responden-responden kedua, ketiga, keempat dan kelima, yang merupakan penjamin-penjamin bersesama dan berasingan suatu perjanjian sewa beli ('perjanjian SB'). Sebelum itu, suatu penghakiman ingkar kehadiran telah pun direkodkan terhadap responden pertama. Fakta menunjukkan bahawa responden pertama telah memeterai perjanjian SB untuk menyewa beberapa peralatan daripada perayu, sebuah syarikat kewangan berlesen. Responden pertama memungkiri perjanjian SB, dan akibatnya perayu menanggung kerugian dan kehilangan. Responden-responden gagal melunaskan hutang, walaupun notis-notis tuntutan telah diserahkan kepada mereka. Berikutnya perayu memulakan tindakan di Mahkamah Tinggi, di mana hakim mendapati bahawa terdapat isu-isu yang perlu dibicarakan sepenuhnya, iaitu: (1) nombor akaun perjanjian SB seperti yang tercatat pada penyata baki di eks. RK3 adalah berbeza; (2) tiada keterangan bahawa

jumlah RM10,000, iaitu hasil jualan peralatan di bawah perjanjian SB, telah diambil kira; dan (3) notis penamatan menurut kehendak perenggan 10 perjanjian SB telah tidak dikeluarkan.

Diputuskan (membenarkan rayuan)
Oleh Zulkefli Makinudin HMR:

[1] Dalam penyata baki di eks. RK3 pada masing-masing perjanjian SB, nombor akaun telah disalahnyata sebagai '95'. Bagaimanapun, kesilapan nombor akaun tersebut telah diperbetulkan melalui afidavit perayu. Suatu kesilapan penaipan tidak menjadi suatu isu yang harus dibicarakan.

[2] Perayu telah mengambil kira jumlah RM10,000 seperti yang ternyata dari perenggan 7 afidavit lanjutan. Responden-responden kedua hingga kelima tidak boleh menyangkal dengan begitu sahaja akaun perayu oleh kerana peruntukan bukti ekslusif perenggan 12 surat-surat jaminan terpakai. Oleh itu isu mengenai pengataan bahawa jumlah RM10,000 tersebut tidak diambil kira bukan lagi suatu isu yang perlu dibicarakan.

[3] Responden-responden mengakui bahawa notis penamatan telah dikeluarkan menurut kehendak perenggan 10 perjanjian SB. Responden-responden kedua, ketiga, keempat dan kelima telah bersetuju dengan penjualan peralatan yang ditarik balik itu pada harga RM10,000, dan telah juga kemudiannya mencadangkan pembayaran tunggakan yang berbaki. Oleh itu, melalui kelakuan mereka, responden-responden telah diestop dari membangkitkan isu bahawa tiada notis penamatan mengikut kehendak perenggan 10 perjanjian SB telah dikeluarkan.

Case(s) referred to:
Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14 r. 1

For the appellant - B Thangaraj; M/s Thangaraj & Assoc
For the respondent - Daya Nair; M/s Nik Saghir & Ismail

[Appeal from High Court, Kuala Lumpur; Suit No: D5-22-853-99]

Reported by Suhainah Wahiduddin

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JUDGMENT

Zulkefli Makinudin JCA:

This is an appeal by the appellant ("the plaintiff in the court below") against the decision of the learned judge of the High
B Court dismissing the plaintiff's application for summary judgment under O. 14 r. 1 of the Rules of the High Court 1980 against the second, third, fourth and fifth respondents ("second, third, fourth and fifth defendants in the court below"). Judgment in default of appearance had been entered against the first
C respondent ("the first defendant in the court below") and the present appeal is directed only against the second to the fifth respondents.

The relevant facts relating to the plaintiff's claim are as follows:

D (1) The first respondent had entered into seven (7) hire purchase agreements ("the HP agreements") to hire various machines with the appellant. The appellant is a licensed finance company.

E (2) The second to fifth respondents are the joint and several guarantors to the HP agreements. The second to fifth respondents as guarantors had signed seven (7) letter of guarantees in relation to the HP agreements.

F (3) The appellant alleged that the first respondent had breached the HP agreements and because of the breach the appellant had suffered damages and losses.

(4) Despite notices of demand being sent to all the respondents, the respondents still failed/refused to pay their debt and the
G appellant took this action against them in the High Court claiming for, *inter alia*:

(i) RM1,372,270.10;

H (ii) Interest at the rate of 18% per annum on RM934,608.70 to be calculated from 16 December 1998 till full realization;

(iii) Interest at the rate of 18% per annum on RM368,413.28 to be calculated from 16 December 1998 till full
I realization;

(iv) Interest at the rate of 18% per annum on RM69,248.12 to be calculated from 16 December 1998 till full realization;

(v) Costs of this action;

(vi) Other relief.

The learned judge in his grounds of judgment in dismissing the plaintiff's application had found that there are triable issues which merit a full trial as follows:

(a) The account number of the HP agreements as stated in the statement of balance in exh. RK3 are different.

(b) No evidence that the sum of RM10,000 being the sales proceeds of the machines under the HP agreements was taken into account.

(c) No notice of termination pursuant to cl. 10 of the HP agreements were issued.

On the third triable issue as found by the learned judge, the learned counsel for the respondents before us in this appeal conceded that there was in fact a notice of termination issued pursuant to cl. 10 of the HP agreements. On this issue we would add by stating that the second, third, fourth and fifth respondents had consented to the sale of the repossessed machines for RM10,000 and had subsequently proposed settlement of the balance outstanding sum (See pp 209-214 of appeal record). Therefore by their conduct the respondents are estopped from raising the issue that no notice of termination pursuant to cl. 10 of the respective HP agreements were issued (See the case of *Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Bhd.* [1995] 4 CLJ 283.

On the first triable issue as found by the learned judge, we find it is not a disputed fact that the correct account numbers of the respective HP agreements are stated in the statement of claim. (See pp 21-23 of appeal record). It is noted that in the statement of balance in exh. RK3 for the respective HP agreement, the account number had been wrongly stated whereby instead of the number "91" it was wrongly stated as "95". However, we find the error in the account number in exh. RK3 was corrected by a further affidavit by the appellant and at para. 4 of the further affidavit it is stated as follows:

A 4. Bagi menjawab perenggan 7, 8 dan 9 Afidavit Defendan, saya akan menyatakan bahawa wujud kesilapan menaip di dalam nombor akaun yang dinyatakan di dalam kesemua Penyata Akaun yang dikepil dan ditanda sebagai Ekshibit RK-3 di dalam Afidavit Plaintif. Nombor-nombor akaun yang sebenarnya bagi setiap
B Penyata akaun di dalam Ekshibit RK-3 adalah seperti berikut:

Nombor Akaun Di Dalam Penyata Akaun	**Nombor Akaun Sebenarnya**
(a) PJ/HP/95/1212	PJ/HP/91/1212
C (b) PJ/HP/95/1213	PJ/HP/91/1213
(c) PJ/HP/95/1223	PJ/HP/91/1223
(d) PJ/HP/95/1224	PJ/HP/91/1224
(e) PJ/HP/95/1229	PJ/HP/91/1229
(f) PJ/HP/95/1230	PJ/HP/91/1230
D (g) PJ/HP/95/1231	PJ/HP/91/1231

Selain daripada nombor "95" yang sepatutnya dinyatakan sebagai "91" di dalam kesemua penyata akaun di dalam Ekshibit RK-3 tidak ada sebarang kesilapan di dalam Penyata Akaun di dalam
E Ekshibit RK-3. Penyata Akaun di dalam Ekshibit RK-3 adalah bagi Perjanjian Sewa Beli dan Surat Jaminan yang dikepil dan ditanda sebagai Ekshibit RK-1 dan RK-2, masing-masing yang dikepil kepada Afidavit Plaintif.

(See pp 58 to 59 of appeal record).

F It is our view a mere typographical error which had been corrected by affidavit evidence cannot amount to a triable issue.

On the second triable issue as found by the learned judge it is our
G finding that the appellant in fact had taken into account the sum of RM10,000 and this fact had been stated in para. 7 of the further affidavit:

7. Peralatan sewa beli berkenaan tidak dapat dijual dan dengan persetujuan Defendan kedua, ketiga dan kelima, kesemua
H peralatan sewa beli bekenaan telah dijual dengan harga RM10,000 dan telah diambil kira sebagai item 'Payment Received' di dalam Penyata Akaun bagi Perjanjian Sewa Beli PJ/HP/91/1212 yang dikepil dan ditanda sebagai Ekshibit RK-3 kepada Afidavit Plaintif, Salinan surat Defendan kedua, ketiga dan kelima dan surat daripada World Biz Trade
I Company (M) Sdn. Bhd, adalah dikepil dan ditanda sebagai Ekshibit "RK-9."

(See p. 60 of the appeal record)

It would also be evident from the following statement of account that the appellant had taken into account the said RM10,000 as follows:

(a) The first respondent in its calculation of the outstanding sum in respect of Account No. 1212 had stated that the instalment paid is RM182,740.

(See p. 202 of the appeal record)

(b) The appellant in its statement of balance in respect of Account No. 1212 had stated that the payment received in respect of the instalment is RM192,740.

(See p. 153 of appeal record)

We further find that the first respondent had also not disputed the computation of the accounts of the appellant in respect of the present claim whereby judgment in default of appearance had been entered against the first respondent. It would follow that the second to the fifth respondents cannot arbitrarily dispute the accounts of the appellant as the conclusive evidence clause stated in cl. 2 of the respective letter of guarantees would apply. Clause 2 states as follows:

> 2. An acknowledgement in writing by the hirer of the Hirer's indebtedness under the said hire purchase agreement (whether such acknowledgement be express or implied) shall be conclusive evidence of such indebtedness against me/us and any judgment or order obtained against the hirer shall be binding on me/us and I/we shall be precluded from disputing the hirer's liability as determined by the said judgment or order.

We therefore find the alleged issue that the said RM10,000 is not taken into account is not a triable issue. We would like to state here even assuming the said sum of RM10,000 is an issue to be tried, the court can still enter the judgment for the sum claimed less the amount of RM10,000.

For the above stated reasons we allowed this appeal and made the orders as prayed for by the appellant in the statement of claim. The respondents were ordered to pay the costs of the appeal. The deposit is to be refunded to the appellant.